Supreme Court, U.S.
FILED

001570 APR 10 2001

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No. _____

In The

Supreme Court of the United States

LOUIS WOZNIAK,

Petitioner,

v.

THOMAS F. CONRY, WILLIAM R. SCHOWALTER, LARRY R. FAULKNER, JAMES J. STUCKEL, and MICHAEL T. AIKEN, In Their Individual Capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

I. Whether the removal of all of Louis Wozniak's professorial responsibilities by University Administrators implicates substantive due process as a result of his tenured status when the Administrators' decision is found to be arbitrary, capricious, or unrelated to any legitimate University interests regardless of whether the University afforded Professor Wozniak procedural due process.

II. Whether Louis Wozniak, a tenured professor, was entitled to notice and an opportunity to be heard, before his professional responsibilities were terminated by University administrators.

III. Whether the First Circuit Court of Appeals is correct in holding that occupational deprivations implicate substantive due process or whether the Seventh Circuit Court of Appeals is correct in rejecting the principle that school authorities who make an arbitrary and capricious decision significantly affecting a tenured teacher's employment status are liable for a substantive due process violation.

IV. Whether the Court of Appeals was correct in resolving disputed factual issues which raised credibility questions on Respondents' *Motion for Summary Judgment* or whether the Petitioner was entitled to have those disputed factual issues decided by a jury.

V. Whether the Court of Appeals erred in holding that Petitioner's First Amendment/Academic Freedom

QUESTIONS PRESENTED – Continued

claims – premised upon retaliation for the Petitioner having engaged in speech and public discourse of student privacy rights and disclosure of student grade information – were not actionable as only the students could assert a right of privacy in the grading information compiled by the Petitioner and thus speech and public discourse regarding those rights cannot be protected by the First Amendment/Academic Freedom.

VI. Whether the Court of Appeals erred in resolving disputed issues of material fact and in resolving credibility questions concerning whether the University had a grading policy in effect at any time relevant hereto and whether the Petitioner was afforded notice and an opportunity to be heard prior to the termination of his professorial responsibilities.

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CITATIONS TO THE OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 236 F.3d 888 (7th Cir. 2001) and is reproduced in the appendix at App. 1-7. The opinion of the United States District Court for the Central District of Illinois is reproduced at App. 8-22. This opinion has not been officially reported. The District Court's decision, and the Magistrate's Report and Recommendation, with respect to the Petitioner's First Amendment/Academic Freedom claim, is reproduced in the appendix at App. 24-32.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment affirming the District Court's dismissal of the Petitioner's First Amendment/Academic Freedom claim and affirming the entry of Summary Judgment in favor of the Respondents on Petitioner's substantive and procedural due process claims on January 10th 2001. This court has jurisdiction pursuant to Title 28 U.S.C. § 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

> the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in relevant part as follows:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner's responsibilities as a tenured Associate Professor in the Department of General Engineering, including his responsibilities for instructing students, conducting research, publishing the results of his research, and acting as an advisor to students at the Urbana-Champaign campus at the University of Illinois,

were removed by the Respondents 6 months after a dispute between the Petitioner and the Respondents, concerning students grades and the public discourse which followed, had been resolved. No notice of any impending action was given to the Petitioner prior to the removal of his professorial responsibilities nor was there any opportunity to be heard afforded to him.

Petitioner's Complaint alleged that the arbitrary and capricious removal of his professorial responsibilities, without notice or an opportunity to be heard, and in retaliation for having spoken out concerning the grade book issues and student privacy rights, violated his right to procedural and substantive due process, and his First Amendment right to freedom of speech, including academic freedom.

Petitioner's First Amendment claims were dismissed by the District Court's adoption of the Magistrate's recommendations pursuant to Respondents' 12(b)(6) Motion. Petitioner's due process claims were resolved by the District Court's granting of the Respondents' Summary Judgment Motion when the District Court resolved disputed factual findings and held that the removal of Petitioner's professorial responsibilities was not actionable as the Petitioner lacked a property interest in teaching, acting as an advisor to students, conducting research and publishing the results thereof.

The Seventh Circuit Court of Appeals affirmed the Petitioner's property interests as a tenured Professor but resolved other disputed factual issues in favor of the Respondents and held that: (1) Petitioner's substantive due process claim was "frivolous" since it did not involve

a *fundamental right*; (2) Petitioner lacked standing to assert the privacy rights of his students and therefore the Respondents' retaliatory conduct for having spoken out on this issue is not actionable; (3) Petitioner was not entitled to procedural due process since there was no disputed factual issue to resolve with the University administrators and since, according to the Court of Appeals, the Petitioner was afforded an opportunity to be heard concerning the issues prior to sanctions being imposed. The opinion of the Seventh Circuit Court of Appeals does not address the undisputed fact that sanctions were previously imposed upon the Petitioner 6 months earlier for the conduct which allegedly formed the basis for the removal of all of his professorial responsibilities, and thus the subsequent removal of his professorial responsibilities could not, factually or legally, be premised on a claim of insubordination.

STATEMENT OF FACTS

Petitioner filed a Complaint on August 21, 1997, alleging a violation of his procedural and substantive due process rights and a violation of his rights as protected under the First Amendment to the Constitution of the United States as made applicable to the States, and to the Respondents herein by the Fourteenth Amendment thereto.

Prior to the removal of his professorial responsibilities, Petitioner was a tenured Associate Professor in the Department of General Engineering, and as such, he had responsibilities for instructing students, conducting

research, publishing the results of that research, and acting as an advisor to students at the Urbana-Champaign campus of the University of Illinois.

Prior to August 21, 1995, a dispute arose between the Petitioner and Respondent Conry relating to the Respondent's demand that the Petitioner provide to the Respondent, and others, the underlying data and information pertaining to the grading of all students instructed by the Petitioner. When the Petitioner and Respondent Conry were unable to resolve that dispute, Respondent Conry imposed sanctions against the Petitioner as reflected in correspondence dated February 24, 1995. Respondent Conry advised in that letter of sanction that he considered the Petitioner's conduct to be insubordinate and a breach of his employment responsibilities and as a consequence thereof Respondent Conry refused to approve expenditures which the Petitioner had submitted for reimbursement and informed the Petitioner that his upcoming salary review would be affected. The Petitioner suffered the sanctions imposed and believed that the matter was ended. Unbeknownst to the Petitioner however Respondent Conry then sought the assistance of Respondent Schowalter and others in an attempt to coerce the Petitioner into providing the information requested, notwithstanding the sanctions already imposed and notwithstanding Petitioner's persistence that both academic freedom and the privacy rights of the students precluded him from providing the information requested, absent consent from the students, and unless the grading, in its entirety, or the grades of a particular student, were at issue. As a result of this impasse, unbeknownst to the Petitioner, meetings and communications

were had between Respondent Conry and Respondents Schowalter, Faulkner, and Aiken. Those communications resulted in Respondent Schowalter contacting the Petitioner by telephone on August 21, 1995 and ordering the Petitioner to remove all of his belongings from the Department of Engineering immediately. At that time, Respondent Schowalter advised the Petitioner that all of his teaching, research, committee assignments, and advisory responsibilities were being removed from him effective that day, along with his use of staff resources, and that he was to relocate to an office completely away from the Department of General Engineering. No prior notice, nor any opportunity to be heard, was provided to the Petitioner who believed that the issue had already been resolved by the imposition of sanctions previously.

Thereafter, on that same date, the Petitioner requested Respondent Stukel, as President, to intervene and to stop, at least temporarily, the removal of the Petitioner's professorial responsibilities until such time as the Petitioner could be afforded an opportunity to be heard. Respondent Stukel refused to intervene and to either prevent the removal of the Petitioner's responsibilities or to provide an opportunity to be heard to him at which time the issues could be addressed.

Upon the removal of the Petitioner's professorial responsibilities, he was assigned to design a WEB site for the College of Engineering and the responsibility of maintaining it, a task previously, and since, performed by students or academic professionals and not tenured professors.

Petitioner's research laboratory rights were terminated and he was told there was no room for research laboratory space in the college facilities to which he was relocated. He was denied access to graduate and would-be graduate students; was given a non-academic assignment; was unable to complete any publications; was denied committee assignments in his department of tenure; was prevented from any further responsibility for graduate students other than completing his then pending relationship with one ECE 499 Thesis advisee; barred from all regular teaching from and since the Fall of 1995; denied access to departmental services including copying and clerical services and denied a share of the faculty fund for conference travel and other educational purposes; and denied salary increases.

Since August, 1995, the Petitioner has not been permitted to engage in any graduate or under-graduate classroom teaching.

The Petitioner, in Count I, sought damages for a violation of his right to procedural due process as a result of his professorial responsibilities having been removed without notice or an opportunity to be heard. In Count II, the Petitioner alleged that the actions of the Respondents were arbitrary and capricious in that they were unrelated to any educational purpose or pursuit of the institution and were wholly unsupported in fact. Thus, Petitioner sought damages for a violation of his right to substantive due process in Count II of the Complaint. Count III of the Complaint alleged that a substantial or motivating factor for the actions of the Respondents was the Petitioner's

publication of documents relating to the grade book dispute by the posting of correspondence and other documentation on his office door, and as a result of having informed the students whose grades would have been at issue in the controversy, so that each student could individually make a determination as to whether or not he wished his/her grade data to be revealed. Petitioner alleged that the "grade book issue", as delineated in the Complaint, constituted a matter of academic freedom protected by the First Amendment to the Constitution of the United States, and thus sought damages for a violation of his First Amendment Rights.

REVIEW BY THIS COURT IS WARRANTED

A tenured Professor, of 28 years at the University of Illinois, is barred from teaching, research, and contact with students. He is exiled from his office space and Departmental facilities. He retains however his title and income. He is notified of his banishment by a phone call from Respondent Schowalter and ordered to vacate his office immediately. He was given no notice of this contemplated action, nor any opportunity to be heard despite his demands for intervention by Respondent Stukel. The Court of Appeals rejected Petitioner's substantive due process claim characterizing it as "frivolous". It reaches this conclusion not because Petitioner's allegations of arbitrary and capricious sanctions are unsupported factually but because it interprets this Court's decision in *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) as prohibiting substantive due process protections for the property

interest at issue -- a tenured faculty position at a public University.

–Substantive due process–

The Seventh Circuit's interpretation of substantive due process conflicts with the Court of Appeals for the First Circuit (see *Noyes v. Moccia*, 1999 WL 814376 (D.N.H.), citing *Newman v. Massachusetts*, 884 F.2d 19, 25 (1st Cir. 1981)); misinterprets the scope of substantive due process; and renders meaningless the longstanding constitutional protections afforded Academic Freedom and the state created property rights associated with Tenure.

The decision below permits University Administrators to capriciously, arbitrarily, and without regard to whether their actions are wholly unsupported in fact, deprive tenured professors of their property rights and academic Freedom simply by affording the Professor notice and an opportunity to be heard before the Professor's tenure rights are terminated. Tenure *rights* which are subject to revocation at the whim of a University Administrator are not *rights* at all – but simply matters of Administrative grace according to the Seventh Circuit.

Contrary to the Seventh Circuit's interpretation this Court, in *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997), did not intend to remove from substantive constitutional protection employment related property rights. In fact Justice Souter's opinion cites with approval this Court's historic decision in *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). The Court did however caution against **expanding** substantive due process protection because guideposts

for responsible decisionmaking in this unchartered area are scarce and open-ended. (Citing *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068 (1992)). Professor Wozniak's substantive due process claim does not however require an expansion of the doctrine into unchartered areas. It merely requires its application in the employment context – an application that has long been recognized. (See e.g. *Conn v. Gabbert*, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999), where this Court reaffirmed less than 2 years ago the appropriateness of the doctrine of substantive due process in the employment context).

Substantive Due Process has historically been, in some instances, the only barrier to arbitrary and capricious decisionmaking wholly unsupported in fact. Thus, the Courts have held that a policy which precluded persons from driving a school bus if they have a mustache violates substantive due process as it lacks any rational relationship to any proper purpose. (*Penze v. Rosenquist*, 573 F.2d 395 (7th Cir. 1988)) and that the non-renewal of a contract based upon the Plaintiff having had overnight, male guests in her home, violated substantive due process in that it was arbitrary and capricious. (*Fischer v. Snyder*, 476 F.2d 375 (8th Cir. 1973)). Similarly in *Gutzwiller v. Finick*, 860 F.2d 1317 (6th Cir. 1988), the Court held that a tenure decision which was based on gender violated not only the equal protection component of the Constitution, but also substantive due process and in *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966), the Court held that the non-renewal of a contract based on trivial allegations violated substantive due process.

Notwithstanding its historical application in the employment context, the Seventh Circuit, in a singular paragraph, unequivocally denies its further application in this Circuit by its assertion that substantive due process applies only to decisions affecting *fundamental rights*. Intervention by this Court is warranted to resolve the conflicting opinions of the First and Seventh Circuits and to further clarify the parameters of the doctrine of substantive due process. Tenure is of historic and national significance and importance. The Seventh Circuit decision renders tenure and Academic Freedom meaningless.

–Free Speech/Academic Freedom–

The Court of Appeals' rejection of the Petitioner's First Amendment claim stands on no more solid ground than its substantive due process analysis. The Court asserts that absent proof of disparate treatment the Petitioner has no First Amendment claim even if he proves that his professorial responsibilities were removed in retaliation for having spoken out on student privacy issues and for having engaged the students and the press in public discourse regarding the same. The Court asserts that Wozniak's speech is unprotected because only the students had "standing" to complain that their rights were being violated and because "grading" is not entitled to First Amendment protection. According to the Seventh Circuit, it is the University that determines how grades are assigned, not the Professor. The Seventh Circuit is once again at odds with established precedent.

In *Stern v. Shouldice*, 706 F.2d 742 (6th Cir. 1983), the Court held that counseling students regarding their rights is activity which is protected by the First Amendment. In *Parate v. Isibor*, 868 F.2d 281 (6th Cir. 1989), the Court held that grading is entitled to First Amendment protection citing this Court's decisions in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 563 (1969) and *Board of Curators of the University of Missouri v. Horowitz*, 453 U.S. 78 (1978).

> The freedom of the University professor to assign grades according to his own professional judgment is of substantial importance to that professor. To effectively teach her students, the professor must initially evaluate their relative skills, abilities, and knowledge. The professor must then determine whether students have absorbed the course material; whether a new, more advanced topic should be introduced; or whether a review of the previous material must be undertaken. Thus, the professor's evaluation of her students and assignment of their grade is essential to the professor's teaching methods.
>
> The professor's authority over grading was addressed by the Supreme Court in *Board of Curators of the Univ. Of MO v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948 (1978). The Court stated that "[l]ike the decision of an individual professor as to the proper grade for a student in its course (the determination of whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making" (Id. at 90, 98 S. Ct. at 955). The Court concluded that a professor should retain wide discretion in his

> evaluation of the academic performance of his students (Id. at 96, N.6, 98 S. Ct. at 958, N.6 (Powell, J., conferring) *Isibor* at 828).

Moreover other Panels of the Seventh Circuit have held that when determining whether a matter is of public interest and concern, and thus entitled to protection, the Court can properly consider the public nature of the dispute and whether media coverage existed (See *Zorzi v. County of Putnam*, 30 F.3d 885 (7th Cir. 1994) and *Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990). Attached to Petitioner's *Memorandum of Law* filed October 8, 1998, were copies of the articles published in the Daily Illini and the Orange and Blue Observer which clearly reflected a public interest in the "grade book dispute" and the subsequent escalation of that dispute when the students whose grades were at issue necessarily became involved.

As Amended, Count III alleged that the Petitioner had an obligation to protect the privacy rights of the students and to provide them with information upon which they could determine whether they wished to have the underlying grading data revealed. In response to, and in retaliation for, Petitioner's counseling of his students and his refusal to provide the requested data and information to the Respondents without the permission of those students, and as a result of the Petitioner having subsequently published documents relating to the grade book dispute, the Respondents retaliated against the Petitioner in violation of the Petitioner's First Amendment rights as guaranteed through the Fourteenth Amendment to the Constitution.

The District Court erred in granting Respondents' 12(b)(6) *Motion to Dismiss Petitioner's First Amendment Claim* and the Court of Appeals erred in affirming that decision. Louis Wozniak's standing to raise privacy issues involving the grading of his students is irrelevant to the issue of whether his speech concerning those issues is protected from retaliatory sanctions. First Amendment protection has never previously been subjected to a "standing" requirement such as was imposed by the Seventh Circuit herein.

–Procedural Due Process–

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, demonstrate that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. In determining whether a genuine issue of material fact exists, the Court construes all facts in a light most favorable to the party opposing the motion, and draws all justifiable inferences in favor of that party. (Fed.R.Civ.P. 56(c)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The burden of establishing that no genuine issue of material fact exists rests with the movant.

It cannot be disputed that the Petitioner was entitled to notice and an opportunity to be heard before being deprived of his professorial responsibilities. (See *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). The evidence reflects that sanctions were imposed over the grade book issue and the matter was put to rest – or at least the Petitioner thought so. Six

months later however, long after he has already suffered the sanctions imposed over the grade book issue, the Petitioner receives a telephone call advising that all of his professorial responsibilities have been removed. He was afforded no notice of this proposed sanction and no opportunity to respond to the contemplated additional sanctions. Clearly the Seventh Circuit erred in its procedural due process analysis. There were disputed issues. Sanctions had already been levied. How was it that the Petitioner should have known that additional sanctions were being contemplated? How was it that procedural due process was afforded when the matter was closed six months earlier by the imposition of sanctions at that time and no further notice of additional sanctions being contemplated was afforded the Petitioner?

CONCLUSION

The Court of Appeals has rendered tenure and thus academic freedom at a Public University meaningless. So long as notice of termination is afforded and an opportunity to respond is given there can be no constitutional violation even if the termination decision is arbitrary, capricious, or wholly unsupported in fact. This construction of substantive due process places it squarely in conflict with the First Circuit and previous decisions of this Court. The interjection of "standing" into First Amendment jurisprudence to determine if speech is protected is also without precedent. The remaining errors revolve around the willingness of the Court to resolve factual disputes on a summary judgment motion. Absent that summary judgment would have been denied since the

lynchpin of the Court of Appeals' decision is the erroneous assertion that there was a "grade book policy", which the Petitioner violated, and for which he was given the opportunity to respond to before being discharged from his professorial responsibilities.

The Petitioner respectfully prays that his Petition to this Court be granted and that thereafter the judgment of the Seventh Circuit be reversed.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

No. 00-1019

Louis Wozniak,

Plaintiff-Appellant,

v.

Thomas F. Conry, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 97-2182 – **Michael P. McCuskey**, *Judge.*

Argued October 26, 2000 – Decided January 10, 2001

Before Easterbrook, Kanne, and Evans, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* After 28 years of teaching at the University of Illinois at Urbana-Champaign, Louis Wozniak became a rebel. Members of the engineering faculty teach undergraduate classes, which are divided into sections. To ensure consistency in grading across sections, the University requires professors to grade on a prescribed curve and to submit their grading materials. At the end of the fall semester in 1994 Wozniak turned in grades for his two undergraduate sections but refused to submit the required materials for review. Despite demands from increasingly high rungs of the University's hierarchy, Wozniak persisted in his position. In June 1995

Wozniak asked the Chancellor of the University to intervene; after the Chancellor declined to do so, the Dean of the College of Engineering gave Wozniak one last chance to comply or to explain himself. Wozniak let the deadline pass in silence, but the Dean did not. Wozniak asserts that the Dean barred him from teaching any further classes, canceled his research funds, and reassigned him to manage the engineering faculty's Web site. His title (Associate Professor of General Engineering) and his salary were unaffected, however, and he remains on the faculty. Wozniak contends in this suit under 42 U.S.C. § 1983 that, by stripping him of professorial responsibilities and privileges, the University violated both the first amendment and the due process clause of the Constitution.

The district court granted summary judgment for the defendants. We therefore give Wozniak the benefit of all reasonable inferences from the evidentiary record, which is rife with disputes. This means, in particular, that we accept Wozniak's contention that he has been foreclosed from *any* teaching (though the University says otherwise), barred from *all* research (again the University says otherwise), and thus effectively shuttled from the faculty to the administrative staff. Moreover, we accept Wozniak's contention that such a change of duties is out of the ordinary, indeed unheard of, for a tenured member of the faculty. It follows that Wozniak has created a material dispute about the question whether the University has deprived him of his professional stature, a form of property interest – for an employer that strips an employee of the ordinary incidents of the job, in a way that could lead a reasonable,

self-respecting person to resign, has constructively discharged that person even if the employee's title and salary are unaffected. Thus a police department that strips a ranking officer of duties and assigns him to shuffle papers in a broom closet has deprived that officer of property. See *Parrett v. Connersville*, 737 F.2d 690 (7th Cir. 1984). Likewise a school board that reassigns a school's principal to a trifling administrative post. *Head v. Chicago School Reform Board of Trustees*, 225 F.3d 794, 803-04 (7th Cir. 2000). If Wozniak is describing events correctly, he lost more than his dignity and the opportunity to influence students. He lost all prospects of promotion to full professor (though these could not have been bright, since he was still an associate professor 28 years into his teaching career) and, because he lost research support, future scholarly publications, recognition within the profession, and the chance of obtaining private consulting work, all bit the dust. Wozniak did not quit, but this is not fatal to reliance on a theory of constructive discharge; some employees have poor prospects elsewhere (often their opportunities are diminished by the same acts that amount to a constructive discharge). See *Hunt v. Markham*, 219 F.3d 649 (7th Cir. 2000). Because state law and the University's regulations give Wozniak tenure *as a faculty member* and not just as an all-purpose employee equally suited to the classroom and the janitorial staff, the dramatic change of duties affected his "property" within the meaning of the due process clause. Compare *Board of Regents v. Roth*, 408 U.S. 564 (1972), with *Perry v. Sindermann*, 408 U.S. 593 (1972).

Wozniak believes that this resolves matters in his favor, but it does not, because the due process clause does

not require that a formal, adversarial hearing precede every decision affecting property. An employee who keeps his title and salary has lost considerably less property than one fired outright, and we know from *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976), that the extent of process increases with the severity of the deprivation. Wozniak was entitled to "*some* kind of hearing," *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (emphasis in original), which means that he was entitled to an opportunity to present his side of the story. See Henry J. Friendly, "*Some Kind of Hearing*", 123 U. Pa. L. Rev. 1267 (1975). He had that chance many times, through multiple levels of review within the University, and one who has spurned an invitation to explain himself can't complain that he has been deprived of an *opportunity* to be heard.

What is more, even for the most important decisions, an evidentiary hearing is required only if there are material factual disputes. District courts regularly grant summary judgment without receiving oral testimony, and they dismiss complaints without receiving evidence, yet no one supposes that the Federal Rules of Civil Procedure violate the Constitution on that account. The due process clause does not require a hearing – in either a court or a university – where there is no disputed issue of material fact to resolve. See *Codd v. Velger*, 429 U.S. 624 (1977); *Paige v. Cisneros*, 91 F.3d 40 (7th Cir. 1996). Here there is no material dispute: Wozniak refused to follow the University's grading rules, and in this suit he trumpets a claim of right to defy them. Why hold a hearing when the insubordination is conceded? Sometimes the Constitution extends an opportunity to tell one's side of the story and

thereby inform the decisionmaker's discretion in selecting the appropriate penalty. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 & n.8 (1985); *Goss*, 419 U.S. at 583-84. The University gave Wozniak that chance at least three times, thus affording all the process that is due. A faculty member is hardly in a position to argue that the opportunity to submit an explanation or statement of position in writing is inadequate; professors make their living by the written word, so illiteracy is not a risk that the decisionmaker must consider when devising procedures for dispute resolution.

Wozniak's remaining arguments are frivolous. He contends, for example, that the University's decision deprives him of "substantive due process." But this doctrine applies only to decisions affecting fundamental civil rights. See *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997). No teacher has a fundamental right to hand in random or skewed grades, or to pretend that 95% of his students are better (or worse) than average. No person has a fundamental right to teach undergraduate engineering classes without following the university's grading rules. Quite the contrary, both a university and its students have powerful interests in the comparability of grades across sections, for grades are a university's stock in trade and class rank may be vital to a student's future. By insisting on a right to grade as he pleases, Wozniak devalues his students' right to grades that accurately reflect their achievements.

As for Wozniak's claim that students have a right under the first amendment, federal statutes, or notions of privacy to keep grading information from a university's administrators: Wozniak lacks standing to make such an

argument. Students themselves would be the right plaintiffs. The contention also is unfathomable. Grades appear on students' transcripts; the transcripts bear the university's seal and imprimatur, so a university necessarily knows every student's grades. Transcripts (and diplomas, if the grades warrant them) are issued by the university, not by members of the faculty individually or collectively. It is the University's name, not Wozniak's, that appears on the diploma; the University, not Wozniak, certifies to employers and graduate schools a student's successful completion of a course of study. Universities are entitled to assure themselves that their evaluation systems have been followed; otherwise their credentials are meaningless. Some universities offer their faculty more control over grading than the University of Illinois afforded Wozniak, and maybe discretion is good. But competition among systems of evaluation at different universities, not federal judges, must settle the question which approach is best. Each university may decide for itself how the authority to assign grades is allocated within its faculty.

Finally, Wozniak's contention that he is the victim of "retaliation" for taking his stand against the University's grading policy adds nothing. A violation of an employer's lawful rules does not become an improper basis for decision just because the employee makes his position known to the public. Wozniak does not contend that other professors have defied the University's grading rules, kept their silence, and escaped any response. Without proof of that kind, the University's decision must be

understood as a reaction to Wozniak's behavior, not as a penalty for his speech about that behavior.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

LOUIS WOZNIAK, Plaintiff,	)	No. 97-2182
v.	)	(Filed Dec. 1, 1999)
THOMAS F. CONRY, WILLIAM R. SCHOWALTER, LARRY R. FAULKNER, JAMES T. STUKEL, and MICHAEL AIKEN, in their individual capacities, Defendants.	)	

ORDER

This matter is before the court on Defendants' Motion for Summary Judgment (#47) on all remaining counts of Plaintiff's Complaint. In addition, Defendants have moved to compel Plaintiff to answer certain discovery requests. Plaintiff, however, has moved to strike that request.

For the following reasons, the court GRANTS Defendants' summary judgment motion on both counts, terminating the case. Accordingly, Defendants' Motion to Compel (#41) and Plaintiff's Motion to Strike (#42) are rendered MOOT.

BACKGROUND

The following facts are uncontested except as otherwise noted. Plaintiff is a tenured engineering professor at the University of Illinois (the "University"). Defendants were various officials within the University at all times relevant to this suit.

In the fall semester of 1994, Plaintiff taught two undergraduate general engineering courses, GE 103 and GE 222. Defendants assert that at that time, the department had a policy requiring instructors to submit copies of their grade books for review. Plaintiff, however, did not submit grade books for his two undergraduate courses at the end of that semester. Consequently, in a letter dated February 3, 1995, Defendant Thomas Conry ("Conry"), the head of the Department of General Engineering, ordered Plaintiff to submit the grade books immediately. Plaintiff did not comply. Increasingly frustrated, Conry sent Plaintiff a letter dated February 21, 1995, expressing his opinion that Plaintiff's noncompliance was insubordinate and a breach of his duty as a faculty member.

Conry sent a copy of this letter to Defendant William Schowalter ("Dean Schowalter"), Dean of the College of Engineering. Dean Schowalter than appointed Associate Dean of the College Roscoe Pershing ("Dean Pershing") to resolve this dispute. On May 19, 1995, Dean Pershing notified Plaintiff of his appointment by letter. In response, Plaintiff informed Dean Schowalter that he had asked Defendant Michael Aiken ("Chancellor Aiken"), the Chancellor of the University of Illinois, Urbana-Champaign, to review the dispute. On June 20, 1995,

Chancellor Aiken informed Plaintiff by letter that he would not intervene or overrule any previous decisions regarding the grade book dispute. On June 23, 1995, Dean Pershing ordered Plaintiff to submit the grade books along with any explanation for his earlier refusals. Plaintiff again refused. According to Plaintiff, however, he had requested that Dean Pershing allow him more time in which to comply, but was denied that request.

The parties dispute much of what happened next. According to Defendants, Dean Schowalter refused to assign Plaintiff any further undergraduate teaching duties, but did assign him other tasks. Defendants assert that Plaintiff continued to teach a course for graduate students, and also maintained his research and committee work. Moreover, Defendants assert, Plaintiff suffered no reduction in pay and remained a tenured associate professor.

In contrast, Plaintiff claims that Defendants removed him completely from the Department of General Engineering. They took away not only his undergraduate teaching duties, but also the opportunity to advise students and serve on committees. Moreover, he complains, Defendants deprived him of the use of staff services and research facilities. He admits that he remains tenured and collects the same pay, but claims that he has been denied raises since this dispute erupted.

Based on these events, Plaintiff brought a three-count complaint against Defendants. In Counts I and II, Plaintiff alleged that Defendants violated his rights to both procedural and substantive due process of law when they deprived him of his protected property interest in his

position as a tenured professor. In Count III, Plaintiff alleged the Defendants violated his First Amendment right to freedom of speech when they retaliated against him for speaking out against their demand for his grading materials. On Defendants' motion, this court dismissed Count III, leaving only Plaintiff's due process claims intact. This motion for summary judgment on Plaintiff's remaining claims followed.

ANALYSIS

Summary judgment is granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In ruling on a motion for summary judgment, the court must decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial. *Waldridge v. American Hoescht Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). In reaching this decision, the court must consider the evidence in the light most favorable to the party opposing summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The burden of establishing that no genuine issue of material fact exists rests with the movant. *Jakubiec v. Cities Serv. Co.*, 844 F.2d 470, 473 (7th Cir. 1988). However, neither the mere existence of some factual dispute between the parties nor the existence of some metaphysical doubt as to the facts is sufficient to defeat a motion for summary judgment. *McCreary v. Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1164 (7th Cir. 1997). With these principles in mind,

the court now turns to the merits of the summary judgment motion.

In this case, Plaintiff alleges that Defendants violated his rights to both substantive and procedural due process when they took away the essential duties that constitute his job as a tenured professor. In their motion for summary judgment on these claims, Defendants do not contest that Plaintiff has a protected property interest in his job; nor do they dispute that they could not deprive him of that interest without affording him due process. Rather, they argue that their decision to take away certain duties did not constitute a deprivation of that property interest, and note that Plaintiff continues to collect the same salary and retains the title of associate professor.

The Due Process Clause of the Fourteenth Amendment forbids a state from depriving any person of life, liberty, or property without due process of law. Due process is a flexible concept that "calls for such procedural protections as the particular situation demands." *Buttitta v. City of Chicago*, 9 F.3d 1198, 1201 (7th Cir. 1993) (*quoting Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). As noted above, Plaintiff alleges that Defendants violated both his procedural and substantive due process rights. To sustain a claim under either clause, however, Plaintiff must first demonstrate a cognizable property interest. *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990) (*citing Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)) (explaining that "[b]efore a party may assert a due process argument – procedural or substantive – it must establish that it has a 'legitimate claim of entitlement' to the right being asserted"). "Property" in this context means an entitlement, which is a valuable

right that cannot be withdrawn unless a specified substantive condition is satisfied. *New Burnham*, 910 F.2d at 1479. The constitution does not create property rights; rather, they are created and their dimensions defined by existing rules or understandings that stem from independent sources such as contracts or state law. *New Burnham*, 910 F.2d at 1479 (*citing Roth*, 408 U.S. at 577).

Generally, mere transfers and reassignments do not implicate a constitutionally protected property interest. The Seventh Circuit has held that "[d]isputes over- . . . work assignments . . . do not implicate the great objects of the Fourteenth Amendment." *Brown v. Brienen*, 722 F.2d 360, 365 (7th Cir. 1983). *See also, Maples v. Martin*, 858 F.2d 1546, 1550 (11th Cir. 1988) (stating that tenured university professors had no property interest in teaching in mechanical engineering department rather than in other engineering departments at university); *Volk v. Coler*, 845 F.2d 1422, 1430 (7th Cir. 1988) (finding no property interest in employment at particular office of state welfare agency); *Garvie v. Jackson*, 845 F.2d 647, 651 (6th Cir. 1988) (finding no property interest implicated when academic department head reassigned to regular teaching duties); *Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748, 755 (5th Cir. 1986) (finding that teacher had no protectible property interest in duties and responsibilities as coach); *Kelleher v. Flawn*, 761 F.2d 1079, 1087 (5th Cir. 1985) (finding that assistant instructor had no entitlement to teach specific courses); *Childers v. Independent Sch. Dist.*, 676 F.2d 1338, 1341 (10th Cir. 1982) (recognizing that tenured teacher had property interest in continued employment but not in particular assignment). The Seventh Circuit has also expressed doubt that "a lateral

transfer, involving no loss of pay, could ever be sufficient deprivation to violate the Fourteenth Amendment." *Greenberg v. Kmetko*, 840 F.2d 467, 475 (7th Cir. 1988) (*quoting Parrett v. City of Connersville*, 737 F.2d 690, 693 (7th Cir. 1984), *cert dismissed*, 469 U.S. 1145 (1985)); *see also Lyznicki v. Board of Educ.*, 707 F.2d 949, 951 (7th Cir. 1983) (questioning whether a demotion without loss of pay would ever be a "deprivation" in a constitutional sense.)

The Seventh Circuit has recognized, however, that a property interest in tenured employment encompasses more than the employee's salary, but also includes those duties that define the position. *Parrett v. City of Connersville*, 737 F.2d 690 (7th Cir. 1984). In *Parrett*, the plaintiff was a detective who worked for the city's police department. After the parties clashed over the plaintiff's investigation into the daughter of a prominent citizen, the defendants transferred the plaintiff from chief detective to a position on the city's uniform force. Moreover, although the plaintiff earned the same pay, he was stripped of every one of his duties as a police officer. The defendants instead assigned him to spend his shifts in a windowless room with no telephone and nothing to do. After several months, the plaintiff suffered a mental breakdown and retired. Under those circumstances, the Seventh Circuit held that the defendants had deprived the plaintiff of his property interest in his employment. In so holding, however, the court clarified that the plaintiff had no property interest in his position as chief detective. Thus, if the defendants had merely transferred him to the uniformed force and not stripped him of all his duties, he would have had no cause of action. In other words, his protected interest lay in his employment with the police

department rather than in any particular assignment. *Parrett*, 737 F.2d at 693.

In his complaint, Plaintiff alleged that Defendants did more than transfer or reassign him; rather, they stripped him of each and every one of his professorial duties. Based on that allegation, this court found that he had stated a claim for the deprivation of a property interest under the Seventh Circuit's reasoning in *Parrett*, and denied Defendants' motion to dismiss his due process claims.

In an attempt to avoid dismissal of these claims on summary judgment, Plaintiff provides an affidavit, in which he repeats his assertion that Defendants have stripped him of every one of his professorial duties. To survive a motion for summary judgment, however, Plaintiff must offer more than allegations. Although the court cannot resolve factual issues at this stage, Federal Rule of Civil Procedure 56 does empower it to make a threshold determination of whether a factual issue is "genuine." *Unterreiner v. Volkswagen of Am., Inc.*, 8 F.3d 1206, 1212 (7th Cir. 1993). Not every alleged factual conflict creates a "genuine" issue of material fact. As the Supreme Court points out, if the evidence creating the alleged factual conflict "is merely colorable, or is not sufficiently probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Likewise, if the evidence is contradictory or otherwise inconsistent, it does not create a genuine issue of material fact. *Richardson v. Bonds*, 860 F.2d 1427, 1433 (7th Cir. 1988). Furthermore, the Seventh Circuit has consistently warned that "[s]elf-serving affidavits without factual support in

the record will not defeat a motion for summary judgment." *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1295 (7th Cir. 1993); *see also Haywood v. North Am. Van Lines, Inc.*, 121 F.3d 1066, 1071 (7th Cir. 1997) (stating that "conclusory allegations and self-serving affidavits, if not supported by the record, will not preclude summary judgment").

Here Defendants have countered Plaintiff's assertions that he was stripped of all of his duties with evidence that he actually retained substantial academic duties after losing his undergraduate teaching responsibilities. Plaintiff, however, denies Defendants' characterization of the duties he retained as significant. He admits that he was put in charge of the College of Engineering's Internet web page, but argues that he is overqualified for this position, which is typically performed by students or an academic professional who is not a tenured professor. With the exception of this one task, Plaintiff claims that he was given nothing to do, forced to move out of his office and laboratory space, and denied staff support services and pay increases.

Defendants have submitted a number of documents to contradict this assertion; they also point out that Plaintiff's own exhibits demonstrate that he performed a number of academic tasks since the grade book dispute. Specifically, Defendants point to the biographical profile Plaintiff submitted (Plaintiff's Exhibit 21d), which is dated February 12, 1999. In this profile, Plaintiff states that he is a tenured associate professor in the Department of General Engineering, and outlines his various accomplishments and responsibilities throughout his career, including the years following his loss of undergraduate

teaching responsibilities. For example, the profile indicates that Plaintiff planned to present a paper to the Institute of Electrical and Electronic Engineers ("IEEE") in July of 1999, and that he was appointed to serve as the editor of an IEEE journal. It shows that Plaintiff published academic papers in June of 1995 and December of 1996. In May of 1997 and September of 1998, he published guidebooks for the IEEE. Plaintiff's exhibit also states that he received a grant for his web-related work, and that he won awards for his work advising students in 1995 and 1996. Finally, it indicates that he has served on various committees related to his field of study.

Plaintiff also provides a copy of the department's class schedules for each of the school years following the parties' dispute (Plaintiff's Exhibit 21c). This exhibit does corroborate the undisputed fact that Plaintiff is no longer teaching undergraduate general engineering courses 222 and 324. However, it also shows that Plaintiff was scheduled to teach a four-hundred level course in the Spring of 1997, and a three-hundred level course in the Spring of 1998. Whether these courses were ultimately taught as scheduled is not clear, but Plaintiff offers no evidence that Defendants withdrew these courses or otherwise prevented Plaintiff from teaching them. In any event, the exhibit demonstrates with no evidence to the contrary that Defendants allowed him to teach a course and placed it on the course schedule.

Moreover, Plaintiff's exhibits also contradict his assertion that Defendants have denied him raises since his refusal to turn over the grade books. Although Plaintiff does provide evidence to support his assertion that Defendants denied him a pay increase for the school year

following the controversy, Plaintiff's Exhibit 1a clearly shows that he has received raises each year since then.

In addition, Defendants have submitted their own exhibits to show that Plaintiff has been busy with academic duties since the alleged deprivation of his job. In particular, they attach a copy of a memorandum that Plaintiff submitted to Dean Schowalter outlining what Plaintiff had accomplished during the 1995-96 school year, and a letter to the same effect for the 1996-97 school year. In his memorandum regarding the 1995-96 school year, Plaintiff stated that he advised a graduate student, had a paper accepted for publication, submitted a proposal for a laboratory, advised undergraduates, served on a committee, and worked on his web-related assignment for the University. In his letter regarding his activities the following school year, Plaintiff stated that he spent most of his time developing an engineering course, but also published an academic paper and served on a committee. In addition, Defendants submitted a copy of the department's Spring 1997 course offerings, which was publicized to students. The course offering lists a four-hundred level course entitled "Hydroelectric System Studies" to be taught by Plaintiff.

Plaintiff never directly contests the specific evidence Defendants offer in support of their position that Plaintiff retained substantial duties as a tenured professor. Rather, he merely asserts in an affidavit that he was "relieved of all of his professorial responsibilities including teaching, student advising, use of staff services, research and other facilities" and that his attached exhibits support that assertion. This court recognizes that it should not resolve issues of credibility or weigh facts at this stage. However,

it is the court's duty to determine whether a dispute of fact is genuine. As discussed above, Plaintiff's exhibits contradict his affidavit more than they support it. No one disputes that Defendant deprived Plaintiff of some of his professorial duties. Plaintiff is understandably upset about that deprivation. However, the proffered evidence does not support his allegation that Defendants stripped him of everything meaningful about his job but title and pay like the defendants did in *Parrett*.

Nevertheless, Plaintiff claims that this deprivation of his teaching responsibilities amounted to a due process violation because he had a property interest in teaching. In essence, he argues, teaching constitutes his job, and therefore, he was entitled to due process before he could be deprived of those duties just as he would have been entitled to due process before being terminated. In support of this argument, he asserts that the Seventh Circuit recognized a property interest in a professor's right to teach in *Patterson v. Portch*, 853 F.2d 1399 (7th Cir. 1988).

This court does not agree with Plaintiff's interpretation of *Patterson*. In *Patterson*, the defendants, officials at a state university, terminated the plaintiff's teaching responsibilities and ordered him to perform duties outside the classroom. Unhappy with his reassignment, the plaintiff refused to perform these other duties. The defendants considered the plaintiff's refusal to be his resignation. When the plaintiff requested a hearing, the defendants refused, reasoning that the plaintiff had not been terminated but had resigned. The Seventh Circuit found that under those particular circumstances and especially in light of the parties' underlying dispute over

teaching responsibilities, the defendants had actually terminated the plaintiff and could not avoid affording him the process he was due simply by calling it a "resignation." *Patterson*, 853 F.2d at 1407.

Thus, despite Plaintiff's assertion to the contrary, the court in *Patterson* did not hold that a tenured professor has a protected property interest in his specific duties as an instructor. Rather, the court held that a state employer cannot avoid its obligations to provide due process by simply characterizing a termination as a resignation. Plaintiff is correct that in both cases, the parties' underlying disputes involved the removal of a professor's teaching duties. Beyond that common fact, however, this case does not resemble *Patterson* in any way that matters here. Unlike the defendants in *Patterson*, the Defendants in this case did not fire Plaintiff, or treat him as if he had resigned. They did not stop paying him or cut off his benefits. And despite Plaintiff's bare assertions to the contrary, the evidence submitted by both parties shows that Plaintiff continued to perform academic duties as an engineering professor.

Equally unavailing is Plaintiff's argument that by removing some of his responsibilities, Defendants have deprived him of the possibility to advance, and consequently of his property interest in his job. In support of this argument, Plaintiff cites *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir. 1996), which held that "depriving someone of the building blocks for . . . promotion . . . is just as serious as depriving her of the job itself." *Bryson*, however, involved a sexual harassment case under Title VII, in which the plaintiff alleged that she suffered an adverse employment action for refusing her

supervisor's sexual advances; the case did not involve an unconstitutional deprivation of property. Thus the *Bryson* court did not address whether the "building blocks" for promotion constitute a constitutionally protected property interest. Moreover, Plaintiff has cited no case in which a court has equated an adverse employment action with the deprivation of a constitutionally protected property interest, and has failed to persuade this court to be the first.

Furthermore, even if this court were to hold that Plaintiff's teaching duties constitute a property interest, Defendants would be entitled to qualified immunity. The conduct about which Plaintiff complains was discretionary and thus "shielded from liability for civil damages insofar as [it did] not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). Although Plaintiff argues that he had a clearly established property interest in teaching, Seventh Circuit precedent suggests the opposite conclusion. Consequently, Defendants had no reason to assume that removing some of Plaintiff's duties while continuing to pay him would violate his Fourteenth Amendment rights. Thus, they cannot be held accountable for those actions even if this court were to find a protected property interest in the specific duties of a job.

CONCLUSION

This court finds that there is no genuine issue of material fact that Defendants deprived Plaintiff of any constitutionally protected property interest. Accordingly, Plaintiff's procedural and substantive due process claims cannot stand. This court therefore GRANTS Defendants' Motion for Summary Judgment (#47) on all remaining counts. As a result, Defendants' Motion to Compel Plaintiff to respond to discovery requests (#41), and Plaintiff's subsequent Motion to Strike that motion (#42) are rendered MOOT. This case is terminated.

ENTERED this 30th day of November, 1999.

/s/ Michael P. McCuskey

MICHAEL P. McCUSKEY

U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

LOUIS WOZNIAK, Plaintiff, v. THOMAS F. CONRY, WILLIAM R. SCHOWALTER, LARRY FAULKNER, JAMES STUKEL, and MICHAEL AIKEN, in their individual capacities Defendants.	)	No. 97-2182 (Filed Jan. 05, 1999)

ORDER

This matter is before the court on Defendants' Motion to Dismiss Plaintiff's Amended Complaint [#30, 32]. On December 3, 1998, the Magistrate Judge entered a Report and Recommendation [#36], recommending that the Motion to Dismiss be granted. On December 14, 1998, Plaintiff objected to the Report and Recommendation [#37]. After carefully conducting a *de novo* review of this matter, the court accepts the Report and Recommendation of the Magistrate Judge. The court therefore GRANTS Defendants' Motion to Dismiss [#32]. The case is referred back to the Magistrate Judge for further proceedings.

ENTERED this 5th day of January, 1999.

/s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

LOUIS WOZNIAK, Plaintiff, v. **THOMAS F. CONRY, WILLIAM R. SCHOWALTER, LARRY FAULKNER, JAMES STUKEL, and MICHAEL AIKEN, in their individual capacities,** Defendants.	**Case No. 97-2182** (Filed Dec. 03, 1998)

REPORT AND RECOMMENDATION

This case involves a claim brought by Plaintiff Louis Wozniak pursuant to 42 U.S.C. § 1983 against the above-named Defendants in their individual capacities for violations of his rights under the First and Fourteenth Amendments. Defendants move to dismiss Plaintiff's Amended Complaint (#30). This Court is vested with jurisdiction to hear Plaintiff's claims pursuant to 28 U.S.C. §§ 1331 and 1343. After reviewing the pleadings and memoranda presented by the parties, it is my recommendation pursuant to my authority under 28 U.S.C. § 636(b)(1)(B) that Defendants' Motion to dismiss Plaintiff's Amended Complaint **(#32) be GRANTED.**

I. Statements of Facts and Issues

The Magistrate Judge's Report and Recommendation ("R&R") dated March 5, 1998, contains a complete recitation

of the facts. Plaintiff has since filed an amendment to Count III (#30) in response to the R&R. Count III is a freedom of speech claim under the First Amendment, and as amended alleges that Plaintiff does not know the reason Defendants persistently sought his grading records. As in the original complaint, Plaintiff contends Defendants retaliated against him in violation of his academic freedom for refusing to provide this information. He also argues that Defendants retaliated against him for subsequently posting information regarding the dispute on his office door in order to warn students that their right to privacy might be in jeopardy. As a preliminary matter, it should be noted that the parties have agreed that Count III is not brought against Defendant Stukel contrary to any indication contained in the amended count.

II. Discussion

A. Motion to Dismiss

To survive a motion to dismiss, a complaint must allege sufficient facts to outline a cause of action. *Davis v. Frapolly*, 747 F.Supp. 451, 452 (N.D.Ill. 1989). The court's review is limited to the allegations contained in the pleadings, including documents incorporated by reference and attached as exhibits as well as documents attached to the defendant's motion to dismiss that are referenced in and central to the plaintiff's complaint. *Venture Associates v. Zenith Data Systems*, 987 F.2d 429, 431 (7thCir. 1993); FRCP 10(c). The complaint "must state either direct or inferential allegations concerning all the material elements necessary for recovery under the relevant legal theory." *Carl Sandburg Village Condominium*

Association No. 1 v. First Condominium Development Co., 758 F.2d 203, 207 (7th Cir. 1985). All well-pleaded factual allegations, as well as reasonable inferences drawn from them, are accepted as true in the light most favorable to the plaintiff. *Cornfield v. Consolidated High School District No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993). When considering a motion to dismiss, the Court examines the sufficiency of the complaint, not the merits of the lawsuit. *Triad Associates v. Chicago Housing Authority*, 892 F.2d 583, 586 (7th Cir.1989). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 94 S.Ct. 1683, 1686 (1974).

B. Retaliation Claims under the First Amendment

To establish a prima facie case of retaliation under the First Amendment, the plaintiff must show that he or she engaged in constitutionally protected speech and that the employer retaliated against him or her because of that speech. *Gorman v. Robinson*, 977 F.2d 350, 354 (7th Cir. 1992). The analysis is two-pronged:

> The first analysis focuses on whether the expression is fairly considered to raise matters of public concern. If so, then the second inquiry asks whether the interests of the State in promoting the efficiency of its public services outweigh the interests of the citizen-speaker in commenting on matters of public concern.

Colburn v. Trustees of Indiana University, 739 F.Supp. 1268, 1281 (S.D.Ind. 1990). Even though it may require factual determinations, each of these questions is to be decided

by the court. *Colburn*, 739 F.Supp. at 1281. If the employee successfully establishes the prima facie case, the burden shifts to the employer to show that it would have taken the same action even in the absence of the protected conduct. *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 116 S.Ct. 2342, 2347 (1996). Qualified immunity will not protect an employer retaliating against an employee for speaking on matters of public concern. *Gorman*, 977 F.2d at 355.

An employee's interest in exercising the right of free speech on a particular matter must be balanced with the harm the speech might cause to the interest of the State in delivering its services to the public. *Marshall v. Porter County Plan Commission*, 32 F.3d 1215, 1219 (7th Cir. 1994). *See also Zorzi v. Putnam*, 30 F.3d 885, 896 (7th Cir. 1994). Considered in the balance is the content, form, and context of the statement in light of the entire record, content being the most important factor. *Marshall*, 32 F.3d at 1219. Motive is influential in as much as promoting a purely private interest is not protected, but motive is not in itself determinative. *Id.* "A personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern." *Id.* A public employee's speech is protected if "(1) it would be protected if uttered by a private citizen, (2) it concerns something more than a personal employee grievance, and (3) the employer has not shown a convincing reason to forbid the speech." *Hulbert v. Wilhelm*, 120 F.3d 648, 653 (7th Cir. 1997). Speech is generally not protected if it pertains only to matters of personal interest. *Connick v. Myers*, 461 U.S. 138, 147 (1983). Under those circumstances, "a federal court is not the appropriate forum in which to review

the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick*, 461 U.S. at 147.

Absent a showing of knowingly or recklessly made false statements, a public employee cannot suffer an adverse employment action for speaking on issues of public importance. *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 574 (1968). A suit brought in an attempt to correct allegedly unlawful practices by a public agency or public officials is a matter of public concern. *Zorzi*, 30 F.3d at 897. Misuse of a public office is also of public concern. *Marshall*, 32 F.3d at 1220. A public employee does not forfeit freedom of speech by expressing his or her views privately rather than publicly. *Givhan v. Western Line Consolidated School District*, 439 U.S 410, 414 (1979). Likewise, the use of internal memoranda and telephone calls does not constitute a forfeiture of First Amendment rights. *Holbert*, 120 F.3d at 654.

C. Academic Freedom

Plaintiff in part relies on *Parate v. Isibor* to support his position that the decision not to provide grading information is protected by academic freedom, stating that the Court in that instance "held that grading is entitled to First Amendment protection." In that case, a nontenured professor claimed he was retaliated against in violation of his academic freedom as guaranteed under the First Amendment for not changing a student's grade. *Parate v. Isibor*, 868 F.2d 821, 829 (6th Cir. 1989). According to the Court, the act of assigning a grade is a form of symbolic communication, sending a specific message to a student,

and is therefore entitled to protection under the First Amendment. *Parate*, 868 F.2d at 827. However, the Court limited this protection to instances where school officials order a professor to change a grade. *Id.* at 828. There would have been no constitutional violation if the officials took it upon themselves to alter the student's grade. *Id.* at 829. "Although the individual professor does not escape the reasonable review of university officials in the assignment of grades, she should remain free to decide, according to her own professional judgment, what grades to assign and what grades not to assign." *Id.* at 828. How one could describe *Parate* as "squarely" addressing the sanctity of grading information and data is a mystery. Such an interpretation clearly contradicts the Court's acknowledgement of the authority of university officials to review a professor's assignment of grades.

This is still remains necessary to determine whether Plaintiff's refusal to supply the requested grading information is protected under academic freedom. "Academic Freedom falls within the parameters of the First Amendment and is a special concern of the First Amendment." *Rubin v. Ikenberry*, 933 F.Supp. 1425, 1433 (C.D.Ill. 1996). It is not an independent fundamental right. *Rubin*, 933 F.Supp. at 1439. Academic freedom recognizes the right of both university professors and administrators to act free of government interference, and also the right of individual professors to perform without interference from university administrators. *Id.* at 1433. These rights do not exist harmoniously. *Id.* The rights of the university can be broken down into "the four essential freedoms" – "to determine for itself on academic grounds who may teach, what may be taught, how it will be taught, and who may

be admitted to study." *Parate*, 868 F.2d at 826 (citations omitted). Issues such as curriculum content and tenure, as well as all other administrative matters, rest with the university and not the court. *Rubin*, 933 F.Supp. at 1433, *Anderson-Free v. Steptoe*, 993 F.Supp. 870, 874 (M.D.Ala. 1997), *Parate*, 868 F.2d at 827. On the other hand, " '[t]eachers whose speech directly affects the public's perception of the quality of education in a given academic system find their speech protected.' " *Anderson-Free*, 993 F.Supp. at 874, *quoting Maples v. Martin*, 858 F.2d 1546, 1553 (11th Cir. 1988). This does not mean a professor may engage in "uncontrolled expression which is detrimental to the institution's proper functioning." *Rubin)*, 933 F.Supp. at 1433.

Given this understanding of academic freedom, it seems well within Defendants' authority to request data and information pertaining to grades. The collection of such information in and of itself is an administrative matter, and this Court must respect the autonomy of university officials in this regard. Defendants have in no way interfered with Plaintiff's protected speech, namely the communication with students via the grading system, nor has Plaintiff raised a matter of public concern by refusing to release the grading information. Count III as amended does not shed light on any underlying motive for the demand of grading materials that might suggest a matter of public concern is involved. "[T]he court is not required to assume that because an employer's action could be objected to as an issue of public concern, the employee must have objected to it on that basis." *Hartman v. Board of Trustees of Community College District No. 508*, 4

F.3d 465, 471 (7th Cir. 1993). Therefore, Count III should be dismissed as it pertains to academic freedom.

D. Students' Right of Privacy

Plaintiff also contends that he was retaliated against for advising affected students of their right to privacy by "publishing" documents relating to the grade information dispute on his office door. The plaintiff in *Stern v. Shouldice* claimed he was being retaliated against for exercising his First Amendment right to advise a student to seek legal counsel concerning the student's suspension. 706 F.2d 742, 745-746 (6th Cir. 1983). The court held that such advice was protected under the First Amendment where the record was devoid of evidence that such counseling caused problems with the professor's teaching, faculty members, immediate supervisors, or operations of the university in general. *Stern v. Shouldice*, 706 F.2d 742, 748 (6th Cir. 1983).

The decision in *Stern* does not address whether the speech at issue was a matter of public concern. As previously noted, this is a threshold question in determining whether speech is constitutionally protected. A potential violation of the privacy rights of the students in the Department of General Engineering is not a matter of public concern. Nor does publication by itself turn an issue into a matter of public concern. *Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325, 1330 (5th Cir. 1993). Memoranda posted on the door of an office in a university building is clearly not aimed at the general public. Equally unpersuasive is the fact that descriptions of the events appeared in two publications associated with the

University of Illinois. "The Daily Illini" and "The Orange and Blue Observer" have as their targeted audience students and staff of the University of Illinois.

> Even if the record proves that this dispute was of particular interest to [specific] industries, it does not mean it was a matter of interest to the general public. The fact that the [issue] was reported primarily in industry publications indicates that the speech was not a matter of public concern but rather a matter of private concern of interest only to a particular industry.

Snead, 998 F.2d at 1330. Having failed to meet even the most basic of requirements, Count III in as much as it is based on the students' right to privacy should also be dismissed.

IV. Summary

For the reasons hereinbefore set forth, I recommend that Defendants' Motion to Dismiss Plaintiff's Amended Complaint (#32) be **GRANTED**. The parties are advised that any objection to this recommendation must be filed in writing with the Clerk within ten (10) working days after service of a copy of this recommendation. *See* 28 U.S.C. § 636(b)(1). Failure to object will constitute a waiver of any objections to this Report and Recommendation on appeal. *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538 (7th Cir. 1986).

ENTERED this 3rd day of December, 1998.

/s/ David G. Bernthal
DAVID G. BERNTHAL
U.S. MAGISTRATE JUDGE

(2)

Supreme Court, U.S.
FILED
MAY 11 2001
OFFICE OF THE CLERK

No. 00-1570

IN THE

Supreme Court of the United States

LOUIS WOZNIAK,

Petitioner,

v.

THOMAS F. CONRY, WILLIAM R. SCHOWALTER, LARRY R. FAULKNER, JAMES J. STUKEL and MICHAEL T. AIKEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF FACTS

Petitioner is a tenured associate professor in the Department of General Engineering, within the College of Engineering, at the University of Illinois. In fall semester 1994, petitioner taught an undergraduate course section in general engineering, GE 103, a required course for many engineering majors, and a section of GE 222, also for undergraduate students. Teachers in the Department of General Engineering were required to submit grade books for review within the Department. This policy was designed to assure uniformity and consistency of grading practice and teaching within the Department and across all sections of each course. At the end of the semester, petitioner did not turn in his grade books for his section of GE 103, nor did he provide complete grading information for four students who had received a failing grade in his section of GE 222.

Subsequently, the Dean of the College of Engineering, respondent William R. Schowalter, formed the judgment that petitioner's conduct was interfering with and frustrating the Department's educational mission. After considering the actions of the petitioner, policy concerns and the input from the faculty on issues raised by petitioner's non-compliance with the policy, Dean Schowalter decided to assign and did assign petitioner duties other than teaching undergraduates beginning in the fall semester of 1995. Petitioner maintained his salary, his tenure and his rank as associate professor. The petitioner sued his Department Head, his Dean, the Vice-Chancellor/Provost, the Chancellor and the President of the University.

The controversy that led to this lawsuit began early in 1995, following the close of the 1994 fall semester. When

petitioner did not comply with the policy, his Department Head, respondent Thomas Conry, by letter dated February 3, 1995, ordered the petitioner to turn in the grade books immediately. Petitioner did not comply with this directive and his non-compliance was brought to the attention to Associate Dean Roscoe Pershing on February 7, 1995. Conry considered petitioner's conduct to be a breach of his duty as a faculty member and insubordinate. Conry told petitioner so in a letter dated February 21, which was copied to Dean Schowalter. Petitioner was informed that the breach of his duties and his insubordination would "be considered in determining your teaching assignments, making decisions to withhold permission to charge expenses against Departmental Faculty Fund allocations, and the evaluation of your performance for salary purposes." By letter of February 24, Conry made more explicit each of his warnings of February 21 and specifically told him:

> Your teaching assignments for at least the next year will be changed. You will not be teaching GE 222 or GE 324. There is grave uncertainty about how you are treating your students and until there is full disclosure by you on this matter, plus a review of that information by the Executive Committee of the Department, you will not be considered to teach a class where you set the grading policy.

Dean Schowalter appointed Associate Dean Pershing to decide the dispute over the grade books and petitioner was informed of this on May 19. Petitioner responded on May 30 by informing the Associate Dean that the petitioner had asked respondent Chancellor Aiken to review this dispute along with other disputes that the petitioner had brought to

the Chancellor. On June 20, Chancellor Aiken declined to overrule previous decisions made on the issues presented to him by the petitioner. The Associate Dean wrote to the petitioner on June 23 and requested that the petitioner turn the grade books in to him, together with any relevant explanations. Petitioner did not submit the requested grade books to the Associate Dean. The Dean's action followed.

Petitioner argued to the trial court that he was effectively stripped of all of his teaching, research and service duties. The appellate court assumed this to be true, thus avoiding petitioner's arguments that the trial court had improperly weighed evidence on summary judgment. However, the trial court found that petitioner's position was not supported by the evidence on summary judgment and, further, that the respondents were entitled to qualified immunity on the due process issues. Respondents submitted, in support of their motion, exhibits which included: a letter dated May 1, 1995, from petitioner to Vice Chancellor and Provost Larry R. Faulkner, also a respondent here, in which petitioner acknowledged the requirement that grade books be submitted to the Department; a memorandum from petitioner to various administrators within the College indicating that the petitioner had assumed his position as coordinator of the College's World-Wide Web pages; a memo to petitioner from an Associate Dean, dated September 13, 1995, indicating that the College had provided a budget to support the petitioner's activities, in contradiction to the implication of petitioner's affidavit which claimed he was given no support; and, memoranda from the petitioner outlining the petitioner's activities for the 1995-96, 1996-97 and 1997-98 school years. The memoranda reflect, among other things, that he had advised a master's degree student, had papers accepted for publication, had submitted proposals for a web-operated

laboratory, had advised undergraduates, had conducted his duties as coordinator of the College's Web site, had developed a 300-level course and a 400-level course that were advertised and scheduled to be taught by him, and, that he had been active in various committees and had engaged in private consultation. The trial court relied upon facts contained in documents submitted by petitioner and in documents authored by petitioner but submitted by respondents in its order granting summary judgment.

THE DECISION BELOW

Petitioner claims that his substantive due process right to teach was taken from him arbitrarily and capriciously and that he was denied procedural due process rights in the taking. He also claims these rights were taken in retaliation for the exercise of claimed First Amendment rights. In the trial court, petitioner lost his due process claims by summary judgment; his First Amendment claim was lost on a motion to dismiss. Both decisions were affirmed by the Seventh Circuit Court of Appeals. The Seventh Circuit, putting aside the findings of the trial court as indicated above, assumed that petitioner had been deprived of all teaching duties, barred from all research, and effectively shuttled to an administrative staff position. The court held that petitioner had no substantive due process right to teach without following the University's grading rules. The court held that there was no procedural due process violation for two reasons. First, petitioner had been given several opportunities to present his side of the issue and had spurned them. Second, petitioner did not dispute that he had refused to produce the grading materials for review and there were no material facts in dispute that required an evidentiary hearing. Finally, on the First Amendment claim, the court held that petitioner could not

assert the claimed privacy right of his students and that petitioner's publication of his dispute with the administrators did not convert the decision to remove him from teaching duties from a reaction to behavior to a retaliation for speech about the behavior.

REASONS FOR DENYING THE WRIT

Petitioner presents an argument here on the procedural due process issue that he did not present to the trial court or to the Seventh Circuit. Here, he claims a denial of his procedural due process right because he had already been punished once and did not realize he would be punished again. Neither the fact of the previous "punishment" nor argument concerning the legal consequences of that punishment, is presented in the briefs of the parties before the Seventh Circuit, although exhibits (the letters of February 21 and 24, 1995) upon which the argument here is premised are contained in the record. The procedural due process argument presented to the trial court and the appellate court did not raise an issue of two punishments but rather dealt solely with petitioner's asserted right to a hearing and the alleged failure of respondents to give him one.

On the substantive due process issue, petitioner asserts that there is a split of authority between the First Circuit and the Seventh Circuit. The "split," if there is one, is not particularly germane to the resolution of this case. Moreover, the Sixth Circuit case upon which petitioner relies, *Newman v. Massachusetts*, 884 F.2d 19 (1st Cir. 1981), was decided sixteen years before the decision of this Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997), upon which the Seventh Circuit relied.

On his First Amendment theories, petitioner claims a split between the Sixth Circuit and the Seventh Circuit on an asserted academic freedom right of grading students. He also claims that his publication of the grading issue was protected speech. There is no split of authority. Petitioner's claim of protected speech fails on his allegations and well-developed law.

There is no issue presented that requires review by this Court.

A. Procedural Due Process

As to petitioner's claim of a procedural due process violation, there does not appear to be any novel ground for the opinion of either the trial court or the Court of Appeals. Petitioner does not contest that he refused to follow the grading policy. He had several opportunities to be heard on the issue. He cites no law that requires any more of an opportunity than he was given by the Department Head and the Associate Dean to explain himself. His argument that he was punished twice was not presented to the trial court or the Appellate Court and should not be considered here. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S 206, 212-13 (1998).

The argument is also factually misleading. In his Petition, petitioner cites the letter of February 24 only for the proposition that he was told expenses would not be reimbursed and his salary review would be affected. Petitioner leaves out of his statement of facts that he was told then that he would not be assigned to teach in a course in which he set the grading policy until he met his responsibility and the grading materials were reviewed.

Petitioner knew that the problem was not yet resolved. He knew the Associate Dean had been appointed to decide the problem, he asked the Chancellor to intervene, and he was told to produce the grading material to the Associate Dean. All of this occurred after the "discipline" by the Department Head failed in its intended purpose to have the grade books produced for review. Petitioner had all the process he was due. There is no reason for review.

B. Substantive Due Process

The asserted split on substantive due process rights between the Seventh Circuit in this case and the First Circuit in *Newman v. Massachusetts*, 884 F.2d 19 (1st Cir. 1981) is marginal. The *Newman* court held that plaintiff's property interest in her job triggered a substantive due process right to be free of arbitrary and capricious decision-making, based upon prior decisions of that court, while at the same time recognizing that the Supreme Court had not yet addressed the issue. 884 F.2d at 24-25. In the case below, the Seventh Circuit held that the petitioner did not have a substantive due process right to teach without following the lawful policies of the university on grading. Citing *Washington v. Glucksberg*, 521 U.S. 702 (1997), the court held that substantive due process applied only to fundamental civil rights and petitioner had not identified one on these rights. The split between the Circuits, according to petitioner, is in the holding that substantive due process rights are not implicated in an employment contract governed by the procedural due process clause.

Washington v. Glucksberg holds exactly what the Seventh Circuit said it did — that substantive due process protects only fundamental rights and liberty interests. None

of the cases cited in *Washington v. Glucksberg* hold that a property interest in a job implicates substantive due process. While, as petitioner notes, *Conn v. Gabbert*, 526 U.S. 286 (1999) recognizes some application of substantive due process in an employment case, the right is subject to reasonable regulation. The cases in which it might be more clearly applied are where a statute or regulation result in "a complete prohibition of the right to engage in a calling. . . ." 526 U.S. 291-92.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court cited *Glucksberg* and *Daniels v. Williams*, 474 U.S. 327 (1986) for the proposition that the substantive due process clause would bar "certain government action regardless of the fairness of the procedures used to implement them." 523 U.S. at 840. This Court then addressed the test to be applied for a substantive due process analysis of an executive rather than legislative action. "Arbitrariness," as a constitutional matter, must be tested by a "shocking to the conscience" standard with such "conduct intended to injure in some way unjustifiable by any government interest." 523 U.S. 847-49. The principles of *Washington v Glucksberg* and *County of Sacramento v. Lewis* do not seem applicable to arguments over a protected property interest governed by procedural due process.

In this case, the court below also acknowledged both the university's and the students' "powerful interests" in comparability of grades. That fact coupled with petitioner's refusal to follow the grade book policy indicates that the decision made by the Dean was neither trivial, unrelated to the educational mission, nor without basis in fact. Even if this test of the *Newman* court would be applied here, a test far from certain given this Court's decisions sixteen years

later in *Washington v. Glucksberg* and *County of Sacramento v. Lewis* the decision reached is supported by the record. There is no need of review.

C. First Amendment Retaliation

In his amended Count III, petitioner alleged that respondents demanded that he produce "all of the underlying data and information pertaining to the grading of all of the students instructed by the petitioner" for reasons unknown to petitioner. He then alleges that respondents retaliated against him for his refusal to provide that information and because he posted "correspondence and other documentation on the door of his office" which related to this dispute and because he informed students of the controversy "so that each student individually could make a determination as to whether he or she wished to have his or her grade data revealed." Finally, petitioner alleged that he had a duty to protect the students' "right of privacy" and that his refusal was protected under principles of "academic freedom."

The trial court found that the collection of grading information on the students was an administrative matter "well within Respondent's authority" and therefore not protected by petitioner's right of academic freedom. The court cited *Parate v. Isibor*, 868 F.2d 821, 828-29 (6th Cir. 1989) for the proposition that the university has oversight authority over student grades. Thus, as to the academic freedom allegation, the court dismissed the complaint.

Oversight of the grading of students is particularly within the ambit of the educational mission of the university as carried out at the department level by the Department Head.

In matters of the educational mission, the university judgment should be given great deference by the federal courts. *See, e.g., Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985). Petitioner alleges that he was asked to provide to his Department Head all information regarding the grades of the students taught by the petitioner. On its face, this would seem to be a reasonable request by a Department Head of a teacher in his department. Nonetheless, petitioner pleads that he refused to produce the information to the Department Head and that he claimed that this information was protected by students' alleged right of privacy and his own right of academic freedom.

Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989), the case cited by the petitioner as the source of this right of academic freedom as it relates to grading, deals with the assignment of a grade to a student as activity protected by academic freedom of the professor. *Parate* held that a school cannot tell a teacher what grade to assign but it also recognized that the university itself could assign a grade to the student and even alter the professor's grade. 868 F.2d at 827-28. The court stated: "Although the individual professor does not escape the reasonable review of university officials in the assignment of grades, she should remain free to decide, according to her own professional judgment, what grades to assign and what grades not to assign." 868 F.2d at 828. (But see, *Brown v. Armenti*, __ F.3d __, 2001 WL 388752 at *4 (3d Cir. 2001), holding that the "university professor does not have a First Amendment right to expression via the school's grade assignment procedures.") Petitioner's reliance upon *Parate* to support his refusal to allow departmental review of his grading is quite misplaced and there is certainly no conflict between *Parate* and the decision below. This case does not present an academic freedom issue.

Petitioner also complains of the holding below that petitioner had no standing to assert the alleged rights of students to privacy of their grades vis-à-vis the university. However, *Conn v. Gabbert*, 526 U.S. 286, 292-93 (1999), a case cited by petitioner, recites the rule that a petitioner must assert his own legal rights and cannot rest his claim to relief upon the rights of another.

Nor does petitioner buttress his claim that disclosing the grade book to the Department violates a student's right of privacy. Petitioner cites no case and respondents are aware of no cases that hold that a student has a right of privacy in his grades as against the university. The university has authority over the curriculum and content of courses as well as over the grading policies. *Brown v. Armenti*, __ F.3d __, 2001 WL 388752 at *4 (3d Cir. 2001). *Parate*, as indicated above, noted that the university has a right of review and can even change a professor's grade. Petitioner's citation to *Stern v. Shouldice*, 706 F.2d 742 (6th Cir. 1983) is inapposite if cited for the proposition that a teacher's refusal to follow Departmental grading policy is protected activity. *Stern* did not deal with grades or grading but rather with a professor's advising a student to seek legal help with a suspension.

Petitioner may be relying on *Stern* to argue that his advising students of his unsupported claim that the students had a right of privacy as against the university administration and advising them of the dispute with the Department over the grade books is protected activity. This bootstrapping argument was specifically rejected by the court below. Petitioner refused to follow the policy and when the dispute escalated, he publicized it to his students by posting "correspondence and documents" related to this dispute on his door. This dispute does not appear to be an issue of public

interest but rather an internal dispute over the right of the Department Head to review information concerning the grading of petitioner's students. It was simply a refusal by petitioner to follow legitimate policy.

The Department Head made a reasonable request that the petitioner turn over his grading material for review. Petitioner openly defied his Department Head and his Dean on a matter of policy. As the appellate court held, it was his actions, not his speech, that caused the decision of which he now complains. There is no issue raised in petitioner's First Amendment count that warrants review by this Court.

CONCLUSION

For the foregoing reasons, respondents Thomas F. Conry, William R. Schowalter, Larry R. Faulkner, James J. Stukel and Michael T. Aiken, by their attorneys, Thomas, Mamer & Haughey, pray that this Court will deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
JUN 6 2001
CLERK

No. 00-1570

In The

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LOUIS WOZNIAK,

Petitioner,

v.

THOMAS F. CONRY, WILLIAM R. SCHOWALTER, LARRY R. FAULKNER, JAMES J. STUCKEL, and MICHAEL T. AIKEN, In Their Individual Capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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STATUTES

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ARGUMENT

The Court of Appeals' decision, renders tenure – a property right of long standing tradition and recognition – meaningless and subject to revocation at the whim of University Administrators. The Court of Appeals holds that no substantive due process right is implicated in the arbitrary, capricious, or factually unfounded removal of professorial responsibilities – teaching, research, advising students – since the property right at issue has not previously been construed by this Court as a "fundamental right." This holding leaves University Professors with only that protection afforded by procedural due process. The Court of Appeals' decision, however, holds that these professorial responsibilities are subject to revocation by an administrator simply by notifying the professor of an intent to do so, and affording that professor an opportunity to respond. The Court of Appeals' decision holds that the type of notice and opportunity to be heard which is required, is related to the property right at issue, and that the right to teach, conduct research, and advise students, is of lesser constitutional dimension and significance than the right to retain the title of Associate Professor, and the right to retain a salary. Thus, under the scheme envisioned by the Court of Appeals, the removal of professorial responsibilities can be effectuated simply by advising the professor of an intent to do so, and affording that professor an opportunity to respond (even though the decision has already been made) so long as the University continues to pay the professor's salary and permit him or her to retain the title previously held. The Court of Appeals' decision places no value upon the right to conduct research, teach, or advise students, and fails to

recognize that the removal of one's professorial responsibilities, effectively terminates one's career.

In assessing the impact of the Court of Appeals' decision, one must be guided by the fact that procedural due process affords no substantive impediment to the evisceration of the long standing property rights commonly referred to as tenure, and thus the arbitrary, capricious, and unfounded destruction of a career is rendered non-actionable simply by providing notice of one's intent to do so, and offering an opportunity to the professor to respond to that decision.

The Respondents characterized the Court of Appeals' decision with respect to the substantive due process issue as follows: "The Court held that Petitioner had no substantive due process right to teach without following the University's grading rules." (Brief in Opposition at 4) Thus, according to the Respondents, substantive due process rights exist or evaporate depending upon whether the University rules had been followed or not. This interpretation of substantive due process is clearly erroneous. If there is a substantive due process right, it exists independent of whether there is an allegation that the professor failed to follow University rules. The failure to follow such rules is relevant to whether the decision is arbitrary, capricious, or wholly without a basis in fact, but it is not relevant to whether the right exists in the first instance. Additionally, Respondents' efforts to describe the departure by the Court of Appeals for the Seventh Circuit from established tradition and precedent as "marginal," can only be construed as an effort to minimize the import of this decision so as to avoid its review by this Court. Contrary to the repeated assertion, at page 7 of the

Brief In Opposition, the Seventh Circuit did not hold that the Petitioner did not have a substantive due process right to teach "without following the lawful policies of the University on grading." Instead the Court held that there is no substantive due process right associated with tenure since this long standing property right has not been construed to be a "fundamental right." Clearly, the Respondents and the Petitioner read this Court's decision in *Washington v. Glucksberg,* 521 U.S. 702 (1997), differently. The Petitioner asserts that this Court did not intend to remove from substantive constitutional protection, employment related property rights, including tenure. As noted by the Petitioner, substantive due process has historically been, in some instances, the only barrier to arbitrary and capricious decision making wholly unsupported in fact. Notwithstanding that, in a singular paragraph, the Court of Appeals unequivocally denies the application of substantive due process rights in the employment context by its assertion that substantive due process applies only to decisions affecting "fundamental rights."

The Respondents' acknowledgment that substantive due process historically, and traditionally, afforded protection of property rights even in the employment context, is directly at odds with the effect of the Court of Appeals' decision to interpret tenured property rights as matters simply of administrative grace. The Respondents' substantive due process argument further fails with the acknowledgment that the Record clearly reflects that the University of Illinois did not have in place, the "grade book" policy which serves as the foundation for each of the Respondents' arguments herein, and without which

each of those arguments must fail. Finally, the Respondents wholly fail to acknowledge that in *Washington v. Gluckberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), and subsequently in *Conn v. Gabberg*, 526 U.S. 286, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999), that this Court has consistently reaffirmed the application of substantive due process in the employment context. Petitioner's substantive due process claim was entitled to be determined by a jury and it should not have been prematurely aborted – as a matter of law – by the Courts below.

Petitioner procedural due process claims were similarly entitled to be heard on the merits. Respondents assert that the previous "punishment" argument, and its legal consequences, were not presented to the Seventh Circuit (*Brief In Opposition*, at 5). That assertion is simply incorrect. This issue was raised in the Reply Brief submitted to the Court of Appeals, as a result of the Respondents having raised – for the first time – an assertion that notice and an opportunity to be heard were actually afforded to the Petitioner. In fact, as reflected in the initial Brief filed with the Court of Appeals (at 25), the Respondents never contended below, that Plaintiff was ever afforded notice or an opportunity to be heard regarding the removal of his professorial responsibilities either pre-termination, or post-termination. Once that issue was raised by the Respondents in their Brief before the Court of Appeals, however, it was responded to, and the issue was argued extensively during Oral Argument before the Court of Appeals. The Record below clearly reflects that the Petitioner was never afforded an opportunity to be heard with respect to whether his professorial responsibilities were going to be removed, and that that issue

had been resolved more than six months earlier by sanctions imposed on February 21st. The assertion by the Petitioners to the contrary (*Brief In Opposition*, at page 7), is incorrect and misleading. The intervention of an Associate Dean and the communications with the Chancellor's Office were with respect to reviewing the underlying dispute and **not** with respect to the removal of the Petitioner's professorial responsibilities. It is noteworthy that the Respondents do not contest the Petitioner's entitlement to procedural due process – notice and an opportunity to be heard – but merely claim that such process was afforded to him. To the extent that this acknowledgment renders the procedural due process claim a disputed factual issue, review by this Court would normally be unwarranted. In light, however, of the Court of Appeals having affirmed the resolution of disputed issues of fact rather than permitting a jury to determine that factual dispute absent intervention by the Court, the District Court's assertion that a Plaintiff's affidavit is entitled to less weight than a Defendant's (Petitioner's *Petition For Writ of Certioriari* at Appendix 15 to 16), will remain intact, and current and future litigants will be deprived of the substantial and significant right to a jury trial as a result of the District Court having assumed the responsibility as the trier of fact in each case.

The Record below also reflects that Vice-Chancellor Faulkner, when interviewed publicly, concerning these issues, could not name a singular University department which required grade books to be submitted. During that interview, Vice-Chancellor Faulkner further stated that he would not support a resolution which required submission of grade books. Contrary to Respondents' assertions,

there was no grade book policy, and thus it is both misleading and inaccurate to suggest as the Respondents do, at page 6 of the Brief in Opposition, that "Petitioner does not contest that he refused to follow the grading policy."

Finally, with Respect to Petitioner's First Amendment Claim, the fundamental underlying issue – whether academic freedom with respect to grades lies in the Professor or the University as an institution – places the Seventh Circuit, and now the Third Circuit Court of Appeals (*Brown v. Armenti*, ___ F.3d ___, 2001 WL 388752 (3rd Cir. 2001), squarely at odds with the recognition afforded to Professors by the Sixth Circuit's decision in *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989). The Court of Appeals affirmance of the dismissal of Plaintiff's First Amendment claim, ignores the public discourse concerning this issue, and the allegations of Plaintiff's Complaint which alleged that the Plaintiff was retaliated against as a result of that public discourse. The American Association of University Professors, and the Family Educational and Privacy Rights Act (20 USC § 1232(g)), acknowledge the student's privacy interests in educational records, and the Courts below erred in finding – as a matter of law – that University Administrators are entitled to retaliate against the Plaintiff for having engaged in public discourse concerning those privacy rights on the basis that he lacked "standing" to do so. (*Petition for Certiorari*, Appendix at 5-6). Contrary to the assertion of the Court of Appeals, it is not simply the students who are entitled to raise, and address publicly, an invasion of their privacy and federally guaranteed rights. The Petitioner, as their professor,

had an obligation to do so, and the interjection of "standing" as a requirement in First Amendment analysis, is without precedent. Furthermore, it eviscerates the long standing recognition that retaliation by the Government for the exercise of First Amendment (free speech) rights, is actionable.

CONCLUSION

As reflected in the *Petition for Writ of Certiorari*, and in this Reply to Respondent's *Brief in Opposition*, it is clear that it is the concept of academic tenure, and the long standing tradition of the rights attendant thereto, which are under attack by the Respondents in this case, and which the Court of Appeals' decision, converts to matters simply of administrative grace. Neither notice nor an opportunity to be heard was afforded to the Petitioner prior to the removal of his professorial responsibilities, and until the filing of the Respondents' Brief in the Seventh Circuit Court of Appeals, the Respondents had never contended that any constitutionally sufficient notice or opportunity to be heard, was afforded to the Petitioner. Perhaps more importantly, however, is the Court of Appeals' interpretation of this Court's substantive due process analysis, and the elimination of that right as a check against arbitrary, capricious, and unsupported in fact decision making in the employment context.

Finally, the interjection of a "standing" requirement in the context of a First Amendment retaliation claim, is wholly without support in any precedent of this, or any

other, Court and raises a new and profound barrier to the First Amendment rights of the citizenry of this country by interjecting into the equation an inquiry as to whether the speaker is a person who is entitled to speak out on a matter at issue which would otherwise be entitled to First Amendment protection.

The Petitioner respectfully prays that this Court grant his *Petition for Writ of Certiorari* and that thereafter, the judgment of the Seventh Circuit Court of Appeals, be reversed with further proceedings to be afforded to the Petitioner consistent with this Court's Opinion, in the District Court.

Respectfully submitted,

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